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In the

Supreme Court of the United States

October Term, 1951

No. .....

FORD MOTOR COMPANY,
A DELAWARE CORPORATION

Petitioner

v.

MARGARET BENNETT PIERCE AND MARY BAILEY MAHONE, THIRD-PARTY DEFENDANT, AND MARY BAILEY MAHONE

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Ford Motor Company, a Delaware Corporation, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered on August 10, 1951, in the above-entitled cases heard together.

Opinions Below

The memorandum opinion of the District Court (R. 9) is unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 113) is reported in 190 F. (2d) 910 (C. A. 4).

Jurisdiction

The judgments of the Court of Appeals were entered on August 10, 1951 (R. 123). A Petition for Rehearing filed on September 6, 1951 (R. 125), was denied on September 14, 1951 (R. 136). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254 (1).

Questions Presented

1. Did the court below properly refuse to apply the doctrine of *Erie R. Co.* v. *Tompkins*[1] when federal jurisdiction rests solely on diversity of citizenship, and properly refuse to be governed by local law with respect to burden of proof?

2. Did the court below decide an important question of local law with respect to burden of proof where there were equally probable and intervening causes of injuries in conflict with applicable decisions of the Supreme Court of Appeals of Virginia?[2]

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[1] 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct., 817, 114 A. L. R. 1487.

[2] This question includes errors later discussed in the following respects:

(a) The court below failed to recognize and to apply the Virginia law that a plaintiff may not recover for injuries that may have resulted with equal probability from one of two causes, for one of which the defendant is responsible and for the other of which he is not.

(b) The court below failed to recognize and to apply the Virginia law that when proof of negligence is by inference, circumstantial evidence or *res ipsa loquitur*, the cause of the injury must have been, actually or constructively, within the exclusive control of the defendant.

(c) The court below failed to recognize and to apply the Virginia law that, where a second tortfeasor becomes aware, or by the exercise of ordinary care should be aware, of the existence of a potential danger negligently created by an original tortfeasor and thereafter by an independent act of negligence brings about an accident, the negligence of the second tortfeasor is the sole proximate cause thereof.

3. Did the court below direct a trial of these cases on principles of law in conflict with applicable decisions of this Court and of the Supreme Court of Appeals of Virginia?

4. Does the action of the court below impose upon all manufacturers of articles shipped in commerce unreasonable burdens not contemplated by the laws of the United States and of the State of Virginia?

Statement

Moses Mahone, husband of the respondent, Mary Bailey Mahone, bought a 1949 Ford business coupe, Motor No. 98BA712655, on July 22, 1949, from Richmond Motor Company, Inc., in Richmond, Virginia. The automobile was delivered to Mrs. Mahone in Richmond on July 29, 1949. She immediately drove it to her home in Clifton Forge, Virginia, and two days later, Mr. and Mrs. Mahone left in the car for a vacation at Cobb's Creek, Mathews County, Virginia.

On August 9, 1949, Mrs. Mahone undertook to bring the automobile to the Richmond Motor Company, Inc., for an inspection. Mrs. Pierce, the other respondent, accompanied her as a guest. At New Kent Courthouse, Virginia, 44 miles from Cobb's Creek, the right front tire blew out. The driver lost control and the car, traveling about 40 m.p.h., left the highway, struck a tree and was wrecked. Both Mrs. Mahone and her guest were injured. The automobile had then been driven 894 miles.

After the accident it was obvious that both front tires had worn through to the fabric, the right one sufficiently so to cause it to burst. It was then also obvious that the turnbuckle, or adjusting sleeve, on the left tie-rod was loose and could be turned freely by hand without the use of tools.

The respondents brought separate but similar actions

against the petitioner in the United States District Court for the Eastern District of Virginia in the respective sums of $200,000.00 and $100,000.00. By amendment filed, the aggregate demand is now $412,440.00.

The respective complaints (R. 25) both allege that, at the time of the original assembly of the automobile and "before it was delivered to the dealer for sale", the petitioner negligently failed to tighten the nuts holding secure the adjusting sleeve on the tie-rod; that the adjusting sleeve worked loose on the morning of August 9, 1949, permitting the front wheels to become out of line and causing the tires to be completely worn through in the course of the forty-four miles of travel between Cobb's Creek and New Kent Courthouse. Mr. Mahone had personally inspected the tires immediately before the trip was commenced and found them "like new". Mrs. Mahone said that the car was performing perfectly and that she was unaware that anything was wrong until the moment of the accident (R. 97, 106).

Depositions taken for discovery showed that Richmond Motor Company, the retail dealer, has followed for more than twenty years the practice of "checking all cars before they are delivered" to purchasers. W. E. Koch, employee of the dealer, inspected and checked the Mahone automobile before it was delivered to Mrs. Mahone and filled out a "New Car Delivery Report" on that car (R. 31). In the course of that inspection Koch checked and inspected the caster and camber and the alignment or toe-in of the front wheels of the Mahone automobile. He noted the results in each respect on the "New Car Delivery Report", the original of which was placed in the glove compartment and a copy retained by the dealer.

The nature of the inspection required Koch to check the alignment of the wheels. If he found them already in alignment, he checked the lock-nuts on the adjusting sleeve to

see that it was held securely in place. If they were loose, he tightened them. If the wheels were not in alignment when he inspected them, it was necessary for him to unloosen the lock-nuts on the adjusting sleeve (if they were already tight), realign the wheels by means of the adjusting sleeve, and then to retighten the lock-nuts to hold the sleeve securely in place (R. 60).

The foregoing inspection of necessity required that Koch place a wrench on the particular nuts in question and to apply physical force to the wrench so placed thereon for either one of two reasons: (1) to make an adjustment for toe-in, or (2) to check and see that the nuts were tight if no adjustment was necessary.

On or about August 1, 1950, shortly before the appropriate statute of limitations would run thereon, each respondent brought a separate action against Richmond Motor Company in the state Circuit Court of the City of Richmond in which each alleged that the dealer had a specific duty to make a proper inspection of the automobile before delivery of it to a purchaser, that the adjusting sleeve was loose when received by it from the Ford Motor Company, that the dealer negligently failed to make a proper inspection and negligently failed to discover the loose adjusting sleeve (R. 23, 110).

The petitioner filed its motion for summary judgment in both actions on March 2, 1951, basing the motions on the grounds that: (1) the complaints failed to state claims upon which relief could be granted for the reason that under Virginia law the petitioner cannot be held liable to the plaintiffs for negligence in the manufacture, assembly or inspection of the automobile in question; (2) the doctrine of *res ipsa loquitur* does not apply under Virginia law to the facts alleged in the complaints; and (3) the charges of negligence made in the respective complaints are eliminated under Virginia law by the intervention of the new car inspection

and conditioning of the automobile made by Richmond Motor Company prior to its delivery (R. 12). Attached to each motion was the deposition of Koch and a certified copy of the Motion for Judgment filed by that respondent against Richmond Motor Company in the state court.

On April 26, 1951, the District Court announced by letter to counsel his decision to grant the motions for summary judgment (R. 4). The District Court pointed out that there was no allegation of a latent defect in the material or the workmanship used in producing the component parts of the adjusting sleeve. The faulty workmanship complained of consisted solely in the failure to tighten certain nuts susceptible of being loosened and tightened innumerable times between the manufacture of the automobile and the injury in these cases. The district judge concluded that, in view of the liberality of the rules pertaining to examinations for discovery, it could not be assumed that respondents could produce at a trial evidence materially at variance with the facts disclosed upon the motion for summary judgment. In oral argument before the District Court counsel conceded that respondents had no direct proof and that they relied solely on circumstantial evidence.

The District Court's decision was based on the determination that, under the law of Virginia, negligence must be proven and the cause of an injury singled out and pointed to by the plaintiff with reasonable certainty; that the jury cannot speculate as to cause; and that it is obvious, under the facts of these cases, that any verdict in favor of respondents would necessarily be based upon conjecture or speculation (R. 5).

On May 9, 1951, appropriate judgments of dismissal were entered (R. 8, 30). Respondents appealed to the United States Court of Appeals for the Fourth Circuit. The opinion

of that court, delivered August 10, 1951 (R. 113), reversed the District Court on the basic ground that "the state practice is not binding on the federal courts" (R. 115). In support of that decision, it cited *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 64 S. Ct. 409, a case arising under the Federal Employer's Liability Act and not a case where jurisdiction depends on diversity of citizenship. In other words, the Circuit Court of Appeals refused to follow *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

Specification of Errors to be Urged

The Court of Appeals for the Fourth Circuit erred:

1. In holding that the question of the burden of proof is not governed by local law in these cases where federal jurisdiction is founded solely upon diversity of citizenship, thus failing to properly apply the doctrine of *Erie R. Co.* v. *Tompkins*.[3]

2. In deciding an important question of local law involving the burden of proof with respect to equally probable causes, *res ipsa loquitur*, and intervening negligence in a way in conflict with applicable decisions of the Supreme Court of Appeals of Virginia.[4]

3. In directing that the cases be tried on principles of law in conflict with decisions of this court and of the Supreme Court of Appeals of Virginia.

4. In reversing the orders of the District Court.

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[3] 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

[4] See footnote 2, page 2.

Reasons for Granting the Writ

1. The decision of the court below is directly in conflict with the decisions of this court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817; 114 A. L. R. 1487; *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201; and *Palmer* v. *Hoffman,* 318 U. S. 120, 87 L. Ed. 653, 63 S. Ct. 477.

This Court has repeatedly decided that when federal jurisdiction is acquired because of diversity of citizenship the federal court is, "in effect, only another court of the State", and it must adjudicate the matter in the exact manner in all respects as if it were a state court. *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, 93 L. Ed. 1524, 69 S. Ct. 1235.

> "If recovery could not be had in the state court, it should be denied in the federal court, otherwise, those authorized to invoke the diversity jurisdiction would gain advantage over those confined to state courts."

See also: *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231; *Vanston Bondholders Protective Com.* v. *Green,* 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237; *Angel* v. *Bullington,* 330 U. S. 183, 91 L. Ed. 832, 67 S. Ct. 657; *U. S.* v. *Standard Oil Co.,* 332 U. S. 301, 91 L. Ed. 2067, 67 S. Ct. 1604; *King* v. *United Commercial Travelers,* 333 U. S. 153, 92 L. Ed. 608, 68 S. Ct. 488; *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233; *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221.

More specifically, this Court has expressly held that the question of burden of proof is one of local law by which federal courts are bound in diversity cases. See *Cities Service Oil Co.* v. *Dunlap, supra,* and *Palmer* v. *Hoffman, supra.*

The court below, failed to apply the above principles laid down by this Court. The court below plainly decided that the question of burden of proof in these cases is to be determined by federal rules of decision rather than by local law. The court below said in its opinion:

> "In a federal court, it is for the jury, not the judge, to say what evidence it will believe and what inferences or conclusions it will draw therefrom, even though it is susceptible of conflicting inferences. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35. As the rule is one involving the exercise of the judicial function, *the state practice is not binding on the federal courts,* but we note that *this is the rule in Virginia also.* See *Barry* v. *Tyler,* 171 Va. 381, 199 S. E. 496, 499; *Torbert* v. *A.C.L.R. Co.*, 122 Va. 682, 95 S. E. 635." (R. 115; Italics supplied).

Tennant v. *Peoria & P. U. Ry. Co., supra,* relied on by the court below was a case arising solely under the Federal Employer's Liability Act. In such a case it may be proper for a federal court to apply federal rules of decision, but the application of federal rules of decision is expressly forbidden when federal jurisdiction is founded on diversity of citizenship, as is the case here. *Erie R. Co.* v. *Tompkins, supra, Cities Service Co.* v. *Dunlap, supra, Palmer* v. *Hoffman, supra,* and *Woods* v. *Interstate Realty Co., supra.*

The distinction between the rule of decision in diversity jurisdiction and in the enforcement of a federally created right is made clear in the opinion of this Court in *Holmberg* v. *Armbrecht,* 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582. Since actions arising out of the Federal Employer's Liability Act have no relation or application in this regard to cases arising under the diversity jurisdiction, *Tennant* v. *Peoria & P. U. Ry. Co., supra,* is not authority for dis-

regarding state law in cases arising solely under the diversity jurisdiction.

2. The decision of the court below is believed to be erroneous and in conflict with applicable decisions of the Supreme Court of Appeals of Virginia.

The petitioner's motion for summary judgment (R. 12) raised the question whether there was a genuine issue of fact between the petitioner and respondents. The essential fact necessary for respondents to establish is that the petitioner failed to tighten the nuts on the adjusting sleeve on the tie-rod when it assembled the automobile *before* it was delivered to Richmond Motor Company. If respondents cannot sustain the burden of proof to establish that fact, there is no genuine issue of fact whatever between the parties.

Counsel for the respondents have conceded in oral argument before the District Court that respondents could not produce direct proof but would rely solely on circumstantial evidence.

But the court below said:

> "On the facts as thus developed we think that the issue as to negligence of the defendant was clearly for the jury. Without invoking the res ipsa loquitur rule, we think the jury could well have found that the turnbuckle was loose when the car left the factory and that this was the cause of the wreck. * * * * So far as the evidence as to the inspection by the mechanic is concerned, the jury might believe that no proper inspection had been made by him." (R. 115)

The court below reached the foregoing conclusion on the theory that it was not bound by local law with respect to burden of proof and that federal law would permit a jury to draw such inferences as it saw fit from undisputed facts, even though "susceptible of conflicting inferences."

The court below *noted* that the rule of *Tennant* v. *Peoria & P. U. Ry. Co. supra,* was also the rule in Virginia, citing *Barry* v. *Tyler,* 171 Va. 381, 199 S. E. 496, 499, and *Torbert* v. *A. C. L. R. Co.,* 122 Va. 682, 95 S. E. 635. The decision, however, was rested on the "rule of the federal courts." (R. 116).

Neither of the Virginia cases cited by the court below is applicable to the question of Virginia law presented by the cases at bar. The Virginia cases cited deal with the well established right of a jury to draw reasonable inferences from two sets of physical facts and from conflicting testimony. They do not touch a situation where liability and non-liability are equally probable inferences from one agreed set of facts, nor a situation where reasonable inference establishes with equal probability two equally probable causes of injury for one of which the defendant is not responsible.

The Virginia law here applicable is, as follows:

(a) As to burden of proof with respect to equally probable causes—

A long line of Virginia decisions conclusively establishes that, when damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by one as by the other, since the plaintiff is bound to make out his case by a preponderance of the evidence. *Hopson* v. *Hungerford Coal Co., Inc.,* 187 Va. 299, 46 S. E. (2d) 392; *Campbell & Co.* v. *Messenger,* 171 Va. 374, 1999 S. E. 511; *Pearcey* v. *St. Paul Fire Ins. Co.,* 163 Va. 928, 177 S. E. 843; *N. and W. Rwy. Co.* v. *Poole,* 100 Va. 148, 40 S. E. 627; *Ches. & O. R. Co.* v. *Heath,* 103 Va. 64, 48

S. E. 508; *Ches. & O. R. Co.* v. *Catlett,* 122 Va. 232, 94 S. E. 934.

If the testimony of the new car conditioner, Mr. Koch, is considered for any purpose whatever, it is an inescapable equal probability that Koch unloosened the already tight nuts in order to realign the wheels as that they were loose when the automobile was delivered to the dealer. It cannot be said with more than equal probability whether Koch or the petitioner left the nuts loose.

See *Robey* v. *Richmond Coca-Cola Bottling Works, Inc.,* 192 Va. 192, 64 S. E. (2d) 723; *Beer Distributors, Inc.* v. *Winfree,* 190 Va. 521, 57 S. E. (2d) 902.

(b) As to the doctrine of *res ipsa loquitur*—

The alleged defect was not a defect in material necessarily present at the time of manufacture, as was the fact in *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F 696, Ann. Cas. 1916 C. 440, and in *General Motors Corp.* v. *Johnson,* 137 F. (2d) 320. Nor was it within the sealed package doctrine adopted by the Virginia Court in *Norfolk Coca-Cola Bottling Works* v. *Krause,* 162 Va. 107, 173 S. E. 497.

In Virginia, it is necessary that the party sought to be charged with negligence by inference, circumstantial evidence or the doctrine of *res ipsa loquitur* shall have had at the time of injury, actually or constructively, the exclusive control of the instrumentality involved. It cannot be disputed that both actual and constructive control of the instrumentality by the petitioner in these cases ended with delivery of the automobile to the dealer and that the automobile remained in the dealer's actual and exclusive control thereafter for at least a week, and was thereafter until the accident in the actual and exclusive control of the purchaser, Mr. Mahone and his wife, one of the respondents.

In such circumstances, even if the jury should discard the entire testimony of Koch as unbelievable, a thing the jury could not do under Virginia law, no inference of negligence on the part of the manufacturer could arise under Virginia law from the sole remaining fact that the nut was found loose after the accident. *Norfolk Coca-Cola Bottling Works* v. *Krause,* 162 Va. 107, 173 S. E. 497; *City of Richmond* v. *Hood Rubber Products Co.,* 168 Va. 11, 190 S. E. 95; *Stephens* v. *Virginia Electric & Power Co.,* 184 Va. 94, 34 S. E. (2d) 374; *Anderson* v. *Sisson,* 170 Va. 178, 196 S. E. 688; *Beer Distributors, Inc.* v. *Winfree, supra; Danville Community Hospital* v. *Thompson,* 186 Va. 746, 43 S. E. (2d) 882.

(c) As to intervening negligence and proximate cause—

The respondents themselves have asserted that the Richmond Motor Company was under the specific duty to inspect and that it did in fact inspect the automobile before delivery of it to the purchaser, Mr. Mahone. Whether that inspection was or was not faulty is not here an issue. But, respondents have specifically charged that an improper inspection was made, by reason of which Richmond Motor Company failed in its duty to discover the existing potential danger (R. 23, 110). In any event, respondents expressly charge that Richmond Motor Company ought to have become aware of the potential danger alleged to have been originally created by the petitioner and that its negligent failure to do so directly caused the injury (R. 23, 110). Under Virginia decisions a failure to exercise reasonable care to become "aware of the existence of a potential danger created by the negligence of an original tortfeasor" is an intervening independent cause, that renders the original negligence remote and not proximate. *Hubbard* v. *Murray,* 173 Va. 448, 3

S. E. (2d) 397, *Edgerton* v. *Norfolk So. Bus Corp.*, 187 Va. 642, 47 S. E. (2d) 409.

3. The court below has directed trial of these cases upon the principles announced in its opinion (R. 123, 124, 139). If those principles are incorrect the cases will be tried on erroneous principles of law that will have to be corrected by future appeals. Untold expense of time and money will be wasted unless the errors are now corrected on this petition.

4. The questions presented by this petition are of great importance to all persons, partnerships and corporations engaged in the manufacturing process and who sell and distribute their products through independent dealers.

If this court permits the decision of the court below to stand, the liability of every manufacturer for damages resulting from the use of articles manufactured by him may be established by a mere showing that at the time of or soon after the damage occurred the article in question was not then in *proper adjustment*, even though there is no concealed or inherent defect in either material or workmanship and notwithstanding that the cause of such maladjustment cannot be shown with reasonable certainty.

The respondents here have based their claim against the petitioner upon the single fact that immediately *after the accident* the turnbuckle or adjusting sleeve on the left front tie-rod was found loose and not upon any allegation of a concealed or inherent defect. The court below based its opinion upon that same single fact and, by its decision, has allowed an inference of negligence to search out the petitioner, a remote actor, notwithstanding other intervening circumstances from which other more probable inferences must be drawn.

The District Court correctly applied the proper local law

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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